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SAT NARAIN *v.* BEHARI LAL, I. L. R. 6 LAH. 1 (P.C.), AND AFTER.

The decision of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal*[1] has introduced complications as will be seen from the subsequent reported cases discussing and following the principles laid down in the Privy Council case in matters arising in insolvency both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act. I am attempting to analyse the point and advert to hardships so that, if need be, suitable provisions may be introduced in the Acts to simplify matters, avoiding multiplicity of proceedings and accomplishing easy distribution of the proceeds realised by selling properties answerable for the just debts of the insolvent.

Conceding that the share of the father insolvent undoubtedly vested in the Receiver, the question arose before the Privy Council, in a case of pre-emption, if the son's share also vested in him so as to sequester the co-sharer's right of pre-emption, where it was held, not with reference to the provisions of the Civil Procedure Code but solely with reference to S. 17 and S. 52 (*b*) of the Presidency Towns Insolvency Act, that the entire joint family property did not vest in the Receiver but that, as observed on page 23, "under the provisions of S. 52 or in some other way the property of the sons may, in a proper case, be made available for payment of the father's just debts." Section 2, defining 'property,' contemplated, according to the Board, an absolute and unconditional power of disposal. I may at once mention that in the Provincial Insolvency Act there is no provision corresponding to S. 52 (2) (*b*) but Courts

1 (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M.L.J. 857 (P.C.).

have applied the same principle nevertheless. Being a case arising out of the right to enforce pre-emption, it was unnecessary for the Board to say anything and in fact they said nothing definitely about the power of sale over the son's interest which a father under the Hindu Law undoubtedly possessed, in suitable cases, inasmuch as they held that the sons had not lost their vested interest of ownership, which gave them a right to pre-empt, by the fact of father's insolvency alone.

The above case came up for consideration in almost all the High Courts in India where they had to decide what vested in the Receiver on the insolvency of the father. In normal cases, there is no doubt that, on the vesting order following an adjudication of the father, the Official Receiver can, privately, without resort to the Insolvency Court, sell away the entire joint family property as a Civil Court does in the case of attachment and sale of the entire coparcenary property at the instance of a creditor who had obtained a decree against the father alone, the sons not having been made parties, subject to the right of the sons to raise objections on the score of illegality or immorality of the debts of the father in subsequent proceedings.

Practical difficulties, however, arise when the adjudication precedes or succeeds a creditor's attachment of the whole or the son's property alone or when, in the case of enforcement of pre-partition debts of a father by a suit, division by metes and bounds or division in status alone has been or is sought to be effected by a suit by the son or otherwise before or after adjudication. The matter came up for decision in *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2], *Subramania Aiyar* v. *Sabapathy Aiyar*[3] and In the matter of *Balusami Aiyar*.[4] Before coming to that, it is well to draw attention to the Full Bench decision reported in *T. S. Balavenkata Seetharama Chettiar* v. *The Official Receiver, Tanjore*[5] where the case-law before the Privy Council case has been summarised. In this case it has been definitely held that on the father's adjudication as an insolvent the father's share and his power or capacity to dispose of the son's interest vests in the Court or the Receiver appointed under S. 28 of the Provincial Insolvency Act as per this section and not as 'property' under S. 2 (*d*) of the Act. But in *The Official Receiver, Anantapur* v. *Ramachandrappa*[6]

2 (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
3 (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).
4. (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
5. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).
6. (1928) I.L.R. 52 M. 246: 55 M.L.J. 721.

Mr. Justice Devadoss on a difference of opinion between Mr. Justice Odgers and Mr. Justice Curgenven observed at page 259 that "in the absence of a section corresponding to S. 52 there is no warrant for holding that the power to sell the son's share vests in the Receiver. The matter required to be examined by a Full Bench."

Though after division a father cannot sell the son's share in payment of his debts binding on the erstwhile coparcenary, yet a Court at the instance of an attaching creditor in respect of a pre-partition debt can sell away the entire property, the father's as well as the son's share, in execution though at the time of attachment the coparcenary had been disrupted by reason of division since the suit. This is an instance of an executing Court having greater powers than the father himself whose debts are sought to be satisfied by the Court sale. Vide *Subramania Aiyar* v. *Sabapathy Aiyar.*[3] The same result would follow if the son is impleaded where the partition was effected prior to the suit. If the son is not impleaded, the creditor can proceed only against the father's share.

The complication referred to in this connection arises when after the adjudication of the father the son's share has been attached by a creditor in which case it had been held in *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[4] that the Official Receiver cannot exercise the power of sale as only the power of the father to sell the share of the sons passed to the Official Receiver, which again was subject to the same qualification and burden as it was in the father's hands. It does not appear from the short judgment if the creditor obtained a decree against the son alone and attached his share in some of the properties left after the Official Receiver sold a portion of the coparcenary property or against the father and son and attached the son's share in them, after the father's adjudication, finding it impossible in law to sell the father's share by reason of the insolvency of the father. The Official Receiver in this case would appear to have sold privately some portion of the son's share also under the normal power inherent in him on adjudication but it was only in respect of exercise of such a power after attachment the Court had to say that the Official Receiver could not exercise the power. Whether the same view will be taken if the decree was passed against the father and son or if, even though the son was not a party, a decree was passed,

2. (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
3. (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).

capable of execution against the entire property of the father and son is not a matter quite free from difficulty. It stands to reason, in such a case, that the entire sale should be stopped so as to enable the Official Receiver to sell the father's and the son's share by resorting to appropriate proceedings in the Insolvency Court if attachment can be held to prevent father's alienation *in toto* and if by the supervening adjudication, the power cannot vest in the Receiver. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] it has been held that the sale following an attachment of the property of father and son, the father being adjudicated an insolvent later, must be stayed at the instance of an interim Receiver appointed under S. 20 of the Provincial Insolvency Act. Under S. 28 of the Act, the Official Receiver has absolute control over the realisation of assets for distribution amongst the general body of creditors, so that during the pendency of the insolvency proceedings no Civil Court can possibly cause a sale of the share of the insolvent or that of the son to be held in view of the power of selling such a share vesting in the Receiver as the property of the insolvent. This power must be capable of enforcement for the benefit of the general body of creditors for, otherwise, there is no point in recognising the power and at the same breath rendering the same ineffectual. The power vesting in the Receiver is destroyed by the supervening attachment to the limited extent only, viz., it cannot be exercised privately. But it does vest in him as property of the insolvent available for the general body of creditors who is represented by the Official Receiver. He could have applied under S. 4 of the Provincial Insolvency Act and got an injunction restraining the decree-holder from further proceeding with the sale which was not attempted in this case. Vide *Hajee Ally Mohamed* v. *M. M. Bham.*[8]

Now there is another class of cases leading to the same result, viz., the filing of a suit for partition by the sons against the father subsequent to the adjudication of the father. In such a case it has been held by the Madras High Court in In the matter of *Balusami Aiyar*[4] that on the adjudication of a Hindu as an insolvent under the Presidency Towns Insolvency Act (III of 1909), an order may be passed by the Court in a proceeding to which the sons were parties that the son's interest as such in the joint family property did not vest in the Official Assignee but that the latter was entitled to joint possession and could alienate the son's share also to discharge

4 (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
7. (1931) I.L.R. 55 M. 316: 62 M.L.J. 68.
8. (1928) I.L.R. 6 Rang. 352.

the joint debts of the insolvent, if necessary. It was further held by a majority that the institution of a suit subsequently by the sons against the father for partition of the family properties put an end to the joint family status and with that to the right of the father to alienate his son's share also for his debts and by that means extinguished the right of the Official Assignee also, whose right was only co-extensive with that of the father, to alienate privately the son's share also for the father's debts. Mr. Justice Phillips, however, took the contrary view, viz., that a mere division in status would not defeat the Official Assignee's power, already established, to sell those shares for a proper purpose. Mr. Justice Ramesam on page 439 observes that the substantial right of the Official Assignee is not lost but only one of several remedies open has been extinguished. Possibility of the Official Receiver filing suits against the sons, obtaining decrees and selling the son's share also is suggested. His getting himself impleaded in the partition suit, stepping into the shoes of the insolvent, or applying for the creditors to be made parties in that suit so that the findings as to the nature of the debts may bind all and asking for a decree providing for the payment of such debts as are not illegal or immoral is also suggested A third remedy, viz., in garnishee proceedings, a question can be decided by the Insolvency Judge, if necessary, is also referred to. On page 443 it is observed that the son's liabilities continue as before and they can be worked out by suitable proceedings, but not by private powers of sale. Mr. Justice Madhavan Nair, on page 447 of the judgment, observes that the Official Assignee can institute suits against the sons and enforce the decrees in such suits by selling the son's interest. Vide *Jagannatha Rao* v. *Viswesam*[9] and *Subramania Aiyar* v. *Sabapathy Aiyar.*[3] In the pending partition suit the Official Assignee may apply for the creditors to be made parties and by proper procedure can obtain decrees which they can execute against the son's interests.

What suitable proceedings can be taken came up for consideration before the Madras High Court in a case reported in *A. N. Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] which was one under the Presidency Towns Insolvency Act. In that case, after adjudication, the sons filed a suit for partition with the result that the power to sell privately the son's share was extinguished. But the Official Assignee filed a peti-

3. (1927) I.L.R. 51 M. 361: 54 M.L.J. 726 (F.B.).
9. (1924) I.L.R. 47 M. 621: 46 M.L.J. 590.
10. (1930) I.L.R. 54 M. 739: 61 M.L.J. 66.

tion in the Insolvency Court under S. 7 of the Act corresponding to S. 4 of the Provincial Insolvency Act for a declaration that the son's share also was liable to be proceeded against for the payment of the just debts of the father, not tainted with illegality or immorality, and for selling their property consequential thereon. It was held that the Insolvency Court had power to grant the prayer and the Court granted the reliefs asked for. This was regarded as a logical sequence of the pious obligation of the sons to pay the father's debts, not tainted with illegality or immorality contracted before partition though a partition had taken place in the interval. Mr. Justice Curgenven regarded the possible remedies suggested by Mr. Justice Ramesam in the 51 Madras Full Bench case as *obiter* but, however, he decided in favour of granting the declaration. The result is that what was extinguished in the hands of the Receiver was revived by order of Court obtained at his instance, enabling him to sell the sons' share privately, being armed with this decretal order, or through the Insolvency Court by attaching and selling the same inasmuch as, apparently, the capacity to sell the sons' share, vested in the Receiver in the first instance and extinguished by the supervening partition, got restored as it were by reason of the order of the Insolvency Court. The power of sale being regarded as property of the insolvent vested, and re-vested in the Court or the Receiver, as the case may be, on the happening of the events referred to above. To the same effect are the decisions of the Allahabad High Court reported in *Anand Prakash* v. *Narayan Das Dori Lal*[11] and *Bankey Lal* v. *Durga Prasad*.[12] The latter decision is very instructive on the bearing which a *bona fide* or a *mala fide* partition has on the rights of the Official Receiver when the father alone has been adjudicated an insolvent. A partition which did not provide for the payment of the just debts of the father could in no sense be regarded as a *bona fide* partition and the Insolvency Court before which an application is made by the Receiver can proceed to give relief on that footing. If the father's share was sufficient to satisfy the entire debts, no difficulty is presented. If it is not sufficient, if recourse has to be made to the sons' share also, it is liable to contribute to the discharge of the entire debt, wholly or in part, in which case, it is open to the Receiver to apply under S. 4 of the Provincial Insolvency Act—and these were cases under that Act—and get a declaration. On page 930 His Lordship Mr. Justice Sulaiman held there is no reason why the Receiver should be compelled to go outside

11. 1931 A.L.J. 122 (F.B.). 12. 1931 A.L.J. 917 (F.B.).

the Insolvency Court and file a separate regular suit to enforce the payment of the creditors' debts out of the shares in the joint property which have been taken by the separated sons without making arrangement for their payment. Mr. Justice Mukerji refers on page 940 to the scheme of the law of insolvency and says that the Receiver is to take hold of all the properties of the judgment-debtors, *i.e.*, all the properties, which are available to the judgment-debtor to utilise for the payment of his debts, are available to the Receiver for the same purpose. The creditors are estopped from pursuing their usual remedy against the debtors by means of suits and executions. The Receiver can pursue all the remedies open to the creditors under the law. The only difference is that the Court should grant sanction for the purpose. The learned Judge does not see eye to eye with the Madras decision—In the matter of *Balusami Aiyar*[4]—apparently as regards only the remedy open to the Receiver. According to the Allahabad High Court a subsequent suit for partition or a decree passed therein does not prevent the Receiver from selling properties allotted to members of the family other than the insolvent. *Sita Ram* v. *Beni Prasad.*[13] Where son's interest is involved, a proceeding in insolvency is quite sufficient. What has the Receiver to do after obtaining the declaration prayed for? Can he sell privately or only through Court? It has been held in *Sitaram* v. *Receiver of the Estate of Ram Prasad*[14] that where property in the hands of Hindu sons can be made available for payment of the father's debts, the Receiver of the father is entitled to attach and sell the property, but he has no right to dispossess the sons of the insolvent from the property in their possession. The words "seize" and "attach" in the reported cases were indifferently used to express the same idea. Vide *The Official Assignee of Madras* v. *Allu Ramachandra Aiyar.*[15]

Messrs. Justices Ramesam and Cornish in a case arising under the Presidency Insolvency Act, S. 7, reported in *Krishnamurthi Pillai* v. *Sundaramurthi Pillai*,[16] have held that though S. 7 is widely worded, it does not follow that every possible dispute between the Official Assignee and the son can be dealt with thereunder. So long as the son has not appeared before the Insolvency Court no question can arise between him and the Official Assignee and the question of the binding nature of

4 (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
13 (1924) I.L.R. 47 A. 263. 14 1932 A.L.J. 285.
15. (1922) I.L.R. 46 M. 54: 43 M.L J. 569.
16. (1931) I.L.R. 55 M. 558: 63 M.L.J. 37.

the debts cannot be decided at the instance of the Official Assignee behind the back of the son. Such a thing cannot be done under S. 36 of the Act corresponding to S. 59-A of the Provincial Insolvency Act. The question regarding the binding nature of the debt between the father and the son should be decided in a partition suit to which the Official Receiver is a party. Mr. Justice Ramesam referred to his own observations in 51 Madras case regarding the third remedy open and how those observations had been misunderstood and misapplied by Mr. Justice Curgenven in the later case. The question whether the sons can fill the character of garnishees was not argued before them nor decided by them and the view was only hypothetical on a possibility rendering the remedy non-existent if the condition did not exist.

"The power does not convert the sons' property into the insolvent's property especially when it is remembered that the power ceases to exist on the severance of the joint family No suit for partition can be filed before the Insolvency Court by the Official Receiver as representing the insolvent. Questions between the Official Assignee and his son cannot be decided by the Insolvency Court but must be decided in a partition suit to which the Receiver is a party. I do not agree with the observation of Curgenven, J. that by money claim is meant any claim which can be ranked as divisible assets nor can it be said that because the father has right to sell the son's share in the joint family he has got a money claim against the son. The father can never sue the son for money in this account. The effect of the Hindu joint family law is to give the father or creditor a right to sell the son's share but no more."

Two points are fairly indicated. The son is not a garnishee and proceedings before ordinary Courts against the son so as to reach his share is the only remedy. In view of this conflict of opinion, the uncertainty can be set at rest only by an authoritative pronouncement of a Full Bench. As the law stands at present, the best course will be for the Receiver to file a suit for partition so as to make sufficient property available for the discharge of just debts of the father and in the meantime to have a Receiver appointed for the son's share also. It is also open to individual creditors of the father to sue the son and get a decree operating on his share so that so far as the relief against the insolvent is concerned he can prove the debt before the Official Receiver and as against the son the decree obtained in the suit may be executed.

The question of Court-fee for a suit for partition with suitable declaration and for a suit against the son alone may present some difficulty. In the latter case it will be *ad valorem* whereas in the former case it is a fixed fee according as the suit is filed in the higher or lower Court and according to the value of the relief sought.

The net result of the authorities is this:—

(1) On adjudication, the father's share and the power to sell the son's share vest in the Receiver which can be sold by him privately, if nothing has happened in the meanwhile.

(2) If the sons' share had been attached or a division in status had taken place prior to the exercise of the power of private sale, the power is extinguished and cannot be exercised as such.

(3) In the case falling under (2) above, it is open to the Official Receiver according to the earlier decision to apply under S. 4 or S. 7 of the respective Acts to get a declaration to operate upon the sons' share and the consequential power of sale also can be granted but not according to the later decision which requires a suit to be filed.

(4) According to the Madras High Court the power of sale so got by order of Court can perhaps be exercised out of Court by reason of the Receiver being armed with it whereas according to the Allahabad High Court it has got to be attached and sold by the Insolvency Court.

If the filing of a partition suit at the instance of the Receiver is the only remedy, then this decision must be understood to have set a premium on multiplicity of proceedings taking away the summary exercise of insolvency jurisdiction for the benefit of creditors. If this is the necessary result of the decision in *Sat Narain* v. *Behari Lal,*[1] the sooner the Insolvency Law is amended to secure speedy realisation of distributable assets, the better for all concerned. Suppose the entire property of father and son has been attached, then there is division in status with or without division by metes and bounds and no provision has been made for the payment of the father's debts and the father is subsequently adjudicated an insolvent. What is the position of the Receiver, so far as getting the sons' share sold is concerned? In this case the insolvents' share alone vests in the Receiver and the power of sale does not vest in him at all as there was no coparcenary at the time of adjudication. But inasmuch as all the creditors can, ignoring the partition, proceed against the sons' share, the Official Receiver, stepping into his shoes, can either apply under S. 4 or S. 7 of the respective Acts and get a declaration if the earlier view is sound or file a suit for partition if the later view is sound and get proper decrees passed involving the sons' share also. The execution

1. (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M L.J. 857 (P.C.).

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sale has to be stopped and possession handed over to a Receiver pending the result of the application or suit.

Suppose an adjudication has not taken place but in a creditor's petition against the father an interim Receiver has been appointed under S. 20 of the Provincial Insolvency Act before which the whole property had been attached by the ordinary Court and prior to sale a division in status alone had been effected without making provision for the payment of the father's debts. Pending adjudication, what is the interim Receiver expected to do and what are his powers? The relevant sections of the Provincial Insolvency Act are Ss. 20, 28 (7), 51, 52 and 56 (5). Under S. 20 the Court appoints an interim Receiver of the property of the debtor with directions to take immediate possession thereof, whereupon the interim Receiver shall have such of the powers conferrable on a Receiver appointed under the Code of Civil Procedure as the Court may direct. The object is to preserve the assets for the benefit of the general body of creditors. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] it has been held dissenting from *C.R.Subramania Aiyar* v. *The Official Receiver, Tanjore*[17-19] and following *Haranchandra Chakravarti* v. *Jay Chand*[20] that an interim Receiver has power to apply under S. 52 for stay of sale proposed to be held under an attachment effected prior to the presentation of the petition. The provision in the section that the costs of the suit in which the decree under execution was passed and of the execution shall be a first charge on the property delivered to the Receiver and that the Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge shows that in such cases the Receiver alone is expected to have further conduct of proceedings in the matter of sale with or without any direction of the Insolvency Court as the case may be. In *Sivasami Odayar* v. *C. R. Subramania Aiyar*[7] the property of father and son was attached and the father came before the Insolvency Court later. The sale under the said attachment was held to be liable to be stayed and any sale held in violation of this principle was held to be void. Interpreting Ss. 51 and 52 of the Provincial Insolvency Act, the Calcutta High Court in *Haranchandra Chakravarti* v. *Jay Chand*[20] held that an attaching creditor was only entitled to be classed with other unsecured creditors on the basis of a rateable distribution of assets if before the sale the debtor came within the jurisdiction

7. (1931) I.L.R. 55 M. 316: 62 M.L.J. 68. 17-19. (1925) 50 M.L.J. 665.
20. (1929) I.L.R. 57 C. 122.

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of the Insolvency Court. Vide *Mahasukh Jhaverdas* v. *Valibhai Fatubhai*,[21] *Kanai Lal Marwari* v. *Babu Lal Muchi*[22] and *Ramanathan Chettiar* v. *Subramania Chettiar*.[23] Under S. 56 (5) interim Receivers appointed under S. 20 can invoke in their aid the provisions of S. 56 under which the Court at or after adjudication appoints a Receiver for the property of the insolvent which thereupon vests in him, so that the interim Receiver has, to all intents and purposes, the rights and obligations of a post-adjudication Receiver. If the words "so far as may be" are interpreted to be standing in the way of placing both the Receivers on a par, it is necessary that the sections should be so amended as to confer upon both the Receivers necessary powers to effectuate the object of the Insolvency Act.

The provision in S. 28 (7) which deals with the relating back, viz., that an order of adjudication shall relate back to, and take effect from, the date of presentation of the petition on which it is made renders the Official Receiver to be deemed to be the owner of the property from the date of presentation of the insolvency petition and as such entitled to impeach all dealings and transactions entered into by the insolvent even prior to the date of adjudication.

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As matters now stand—

(1) until the order of adjudication is made there is no insolvency and the debtor retains the property;

(2) no vesting takes place until adjudication. Once the order is made the legal fiction operates; and

(3) the insolvent not only ceases to be the owner but is regarded as not having been the owner between the commencement of the petition and the date of the order of adjudication.

If the fact of division in status prior to adjudication is held to make a difference and to render the principles laid down in the 51 Madras Full Bench case and the 61 M.L.J. case not applicable despite the observations of Justice Bhashyam Aiyangar on page 753—"on the insolvency of the father (*of divided status*)"—the Official Receiver has the only remedy of filing a suit for partition against the sons.

A creditor is entitled to look up to the property of the coparcenary as it existed when the loan was contracted and no subsequent division, with or without intent to defraud his rights, can affect his interests. Apart from insolvency, if he institutes proper proceedings with proper parties he can proceed

21. (1927) 30 Bom. L.R. 455. 22. A.I.R. 1930 Pat. 604.
23 (1924) I.L.R. 48 M. 656: 47 M.L.J. 759.

against the entire property, if necessary. If insolvency supervenes, then the Receiver who steps in to administer the estate as representing the insolvent and his property and for the benefit of the general body of creditors gets all the powers of the creditors and the insolvent enabling him to convert the property into money privately or through Court for the benefit of creditors. No prior attachment nor division of property can interfere with the right of the Receiver to get in the whole property in whomsoever hands it may be for the business of insolvency administration. Whatever property the insolvent had at the time of incurring the debt over which he had a disposing power at the time must pass through the crucible of the Receiver and the law provides for no escape from it. The fact that the original debtor was the father and by the time proceedings are started he died and his sons became owners of the debtors' property and one of them happened to be adjudged an insolvent will not give the father's creditors a priority over the son's creditors. The proceeds of the sale of the insolvent's property will have to satisfy all the creditors equally. According to the Mahomedan Law the ancestors' creditors may have a preferential claim when the heirs become insolvents owing to the peculiar feature of that law and the nature of the estate possessed by the owner and taken by the heirs. There is no coparcenary, no right by birth and no pious obligation to pay the just debts of the father in Mahomedan families. The fact that even in the Hindu Law Mitakshara family, at a partition, provision should be made for the father's debts and the residue alone should be divided among the coparceners does not render so much property as is necessary for the purpose the separate property of the father simply because if the father was so minded he could have alienated it for antecedent debts. If the father had borrowed debts and the sons also had borrowed debts, the former would be binding on the whole family property brought into hotchpot while the latter would be binding only on the share allotted to the sons and the division might take place on that footing. It is quite a different thing to urge that even after the father's death if the property came to the sons by survivorship it is liable in the first instance to satisfy the father's creditors owing to his pious obligation and in the next instance alone to satisfy his own personal creditors. There is absolutely no warrant for this distinction. So long as the father's creditors have not satisfied themselves prior to the insolvency of the sons they must rank equally with the sons' creditors because the proceeds should be realised from one source, viz., the property of the insolvent. The circumstance that the ancestor

could not be adjudged by reason of his death and the descendant likewise cannot be adjudged because of his pious obligation only cannot attract the application of any different principle. Vide *Bhola Nath* v. *Maqbul-un-nissa,*[24] *Kandasami Chetty* v. *Jaypandi Nadar,*[25] *Sankar Lal* v. *Muhamed Ismail*[26] and *Gade Lakshminarasimham Pantulu* v. *Pillalamarri Jagannadha Rao Pantulu.*[27] Any question of priority, if it exists at all, has to be decided before the Insolvency Court.

Relying on *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2] and In the matter of *Balusami Aiyar*[4] Mr. Justice Madhavan Nair in a case reported in *The Official Receiver, Coimbatore* v. *M. Rm. K. A. R. Rm. Arunachalam Chetti*[28] held that when the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent, the petition for adjudication itself having been presented after attachment, the father's power of disposal of the sons' share had been destroyed by the attachment and the Official Receiver cannot, therefore, get any power to deal with the sons' share by reason of the adjudication. The attachment effected could not amount to the attachment of the father's right to dispose of the son's share to pay his own debts. Even the sale proceeds could not be appropriated by the Official Receiver as no authority was cited in support of the proposition that the suspension or destruction of the power did not in any way affect the right of appropriation. The proceeds of the sale of the son's share was not regarded as the property of the debtor (insolvent) though S. 51 was referred to. This decision was on 28th October, 1930 and there was an earlier decision of a Bench on 12th September, 1930, reported in *Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] where Justices Curgenven and Bhashyam Aiyangar had to decide what was property of the insolvent which was available for the Official Receiver while acting for the general body of creditors. Much water has flown since 1926, when *Adusumelli Gopalakrishnayya* v. *Peyyath Gopalan*[2] was decided. If the case reported in *Ramachandra Aiyar* v. *The Official Assignee of Madras*[10] had been brought to the notice of his Lordship, *Balusami Aiyar's case*[4] would have received that interpretation which was contended for by the appellant. Any way Mr.

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2 (1926) I.L.R. 51 M. 342: 54 M.L.J. 674.
4. (1928) I.L.R. 51 M. 417: 55 M.L.J. 175 (F.B.).
10. (1930) I.L R. 54 M. 739: 61 M.L.J 66
24. (1903) I.L R. 26 A. 28. 25. A.I.R. 1929 M. 609.
26. A.I.R 1930 A. 552. 27. (1915) 18 M.L.T. 147.
28. (1930) 33 L.W. 607.

Justice Madhavan Nair's view does not commend itself to principle or authority. From the foregoing aspects, it has become abundantly clear that the decision of the Privy Council in *Sat Narain* v. *Behari Lal*[1] has been the parent of unexpected complications which are more startling than the contentions observed to be startling by their Lordships. These would be avoided if the Full Bench decision of the Lahore High Court is restored.

It seems to me that in the interests of justice and fair dealing with the creditors of a father, clear provisions should be made whereby the Receiver is entitled to sell away the whole property of the joint family, now or erstwhile, subject to objections by the sons on any legal ground. The interim Receiver should be clothed with all the powers of the Receiver on adjudication.

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SUMMARY OF ENGLISH CASES.

BELL *v.* LEVER BROTHERS, LTD., (1932) A.C. 161 (H.L.).

Mistake—Mutual mistake—Principal and Agent—Failure to disclose misconduct—Compensation amount paid in ignorance—Suit to recover—Maintainability—Plea of unilateral mistake.

The principle that mutual mistake renders a transaction void is confined to cases in which the mistake is as to the substance of the whole consideration, going, as it were, to the root of the matter and does not apply where the mistake is only as to some point, a material point it may be, and even one which may have been the actuating motive of the parties, an error as to which does not affect the substance of the whole consideration.

L company, who had a controlling interest in *N* company, entered into an agreement with *B* that the latter should remain in the service of *N* for a certain period. Subsequently the business of *N* company was amalgamated with another concern and thereupon *L* negotiated with *B* to give up his position in *N* company and paid compensation in pursuance of the settlement arrived at. Later on *L* company was informed that *B* had, during his service, entered into certain secret transactions rendering him liable to dismissal. It appeared, however, that this circumstance was not present to the mind of *B* when the settlement was being negotiated. *L* having sued *B* to recover the compensation paid under the settlement,

1. (1924) L.R. 52 I.A. 22: I.L.R. 6 L. 1: 47 M.L.J. 857 (P.C.).

Held, (Viscount Hailsham and Lord Warrington of Clyffe dissenting), that the settlement was not vitiated by mutual mistake and that the action was therefore not maintainable.

Held, further, that the settlement was not vitiated by unilateral mistake because *B* was under no legal obligation to disclose to *L* the secret transactions he had entered into.

Principles applicable to cases of mistakes laid down.

WARING *v.* FODEN, (1932) 1 Ch. 276 (C.A.).

Grant—Conveyance of land—Exception of "mines, minerals and mineral substances"—Sand and gravel whether included—Meaning of word "minerals".

The word "minerals" when found in a reservation out of a grant of land means substances exceptional in use, in value and in character and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant. Secondly, in deciding whether or not in a particular case exceptional substances are "minerals" the true test is what the word means in the vernacular of the mining world, the commercial world, and land-owners at the time of the grant and whether the particular substance was so regarded as a mineral. The fact that certain substances of the district can be worked for the purpose of profit may have a bearing on the question whether they have been recognised as included in the term "minerals" but does not necessarily determine that they have been ordinarily understood to be so included.

Held, on the evidence that the reservation of "all mines, minerals and mineral substances" in the conveyance did not include sand or gravel.

DE TCHIHATCHEF *v.* THE SALERNI COUPLING, LTD., (1932) 1 Ch. 330.

Estoppel—Representation as to legal effect of document—Prospectus issued by Company—Reference to contract with third party—Acquiescence by third party in representation—Effect.

If a person authorises or permits another to make a representation for the purpose of it being acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relationship of the parties.

A prospectus issued by a Company contained a clause to the effect that the Company had entered into favourable contracts with a well-known foreign firm. The foreign firm and their agents having had acquiesced in the insertion of the clause,

Held, that the foreign firm and their representatives were estopped from setting up any other construction of the agreement with them than that set out in the prospectus.

MABRO *v.* EAGLE, STAR AND BRITISH DOMINIONS INSURANCE COMPANY, (1932) 1 K B. 485 (C.A.).

Practice—Addition of party as plaintiff—Discretion of Court —Remedy barred by limitation—Rejection of application for joinder—R. S. C., O. 16, R. 2.

O. 16, R. 2 of the Supreme Court Rules provides as follows:—"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

Held, that the Court should refuse an application for adding a person as party where the remedy in his favour has already become barred by the Statute of Limitations.

SLINGSBY *v.* DISTRICT BANK, LTD., (1932) 1 K.B. 544 (C.A.).

Banker and Customer—Material alteration of cheque—Payment made negligently—Liability of Bank—Drawer leaving space after payee's name—Conduct whether amounts to negligence—Bills of Exchange Act, Ss. 60, 64, 79 and 80.

The plaintiffs, who were executors of a will, had as their Solicitor a firm *C & P.* *C* and his clerk from time to time drew forms of cheques for the executors in favour of a named payee. In some of the cheques there was a blank after the name of the payee. In one such cheque *C* fraudulently inserted after the name of the payee the addition per *"C & P"* and after having it endorsed for *C & P* had it cashed. The plaintiff sued the Bank to recover the amount paid.

Held, that the cheque having been "materially altered" and the payment having been made owing to the defendant's negligence, the plaintiffs were entitled to recover.

Held, further, that the plaintiffs were not disentitled to relief on account of their failure to draw a line in the blank after the payee's name, such a thing not being a "usual precaution."

Decision of Wright, J., in (1931) 2 K.B. 588 affirmed.

KOFFMAN *v.* SUNSHINE, (1932 1 K.B. 606.

Practice—Order as to costs—Costs incurred in Lower Court—Power of High Court to award—County Courts Act, 1888, *S.* 131.

Section 131 of the County Courts Act, 1888, contains a clause to the following effect: "and in any event the High Court may make such order with respect to costs as it shall seem fit."

Held, that the High Court could pass an order as to costs under the section not only as regards costs incurred before it, but also as regards costs in the County Court.

REX *v.* ALEXANDER MURRAY, (1932) 1 K.B. 599.

Criminal Law—Habitual criminal—Conviction in Scotland—When can be taken into account in England.

In order that a conviction in Scotland on indictment for a crime shall be admissible in England as proof that a person is a habitual criminal, the offence for which the man was convicted on indictment in Scotland must also be a crime in England.

THOMPSON *v.* TRUST AND LOAN COMPANY OF CANADA, (1932) 1 K.B. 517 (C.A.).

Income-tax—Double taxation—Finance and Loan Company—Purchase of treasury bonds cum *coupon and sale ex-coupon—Interest received after deduction under Schedule C, Income-tax Act,* 1918—*Liability to assessment under Schedule D as part of Company's assets.*

A company which carried on business as a loan and finance company had in the course of that business dealings in stocks. shares and securities. During the year in question the Company had entered into a number of transactions for the purchase *cum* coupon and sale ex-coupon, of Treasury Bonds. On every day on which a contract to buy bonds *cum* coupon was made, a contract was also made with the same broker to sell bonds of the same nominal value ex-coupon. Each of the two corresponding buying and selling contracts fixed the same date for settlement and the purchase was completed by delivery of bonds with coupons attached. The Company subsequently cashed the detached coupons and received interest less income-tax deducted under Schedule C of the Income-tax Act, 1918.

Held, that the net interest received by the Company on the bonds, having been taxed under Schedule C, could not again be taken into computation for the purpose of assessment of the Company to income-tax under Schedule D.

Decision of Rowlatt, J. in (1932) 1 K.B 283 affirmed.

REX *v.* JUDGE LAILEY. *Ex parte* KOFFMAN, (1932) 1 K.B. 568.

Jurisdiction—Court vested with powers over partnership actions —Suit for declaration of partnership—Defendant's denial of partnership—Jurisdiction if ousted—County Courts Act, 1888, *S.* 67 (7).

Section 67 (7) of the County Courts Act, 1888, provides that the County Court shall have all the powers of the High Court in actions and matters for the dissolution or winding up of any partnership in which the property shall not exceed £500.

Held, that an action for a declaration of partnership and an account could be maintained in the County Court, even though the defendants might plead that there was no partnership between the plaintiff and themselves.

MONTAGU STANLEY & CO *v.* J. C. SOLOMON, LTD, (1932) 1 K.B. 611.

Principal and Agent—Contract of indemnity—Agreement to share profits and losses—Suit to recover loss sustained but not paid—Maintainability.

The defendants who were stock-brokers entered into an agreement with the plaintiffs, another firm of stock-brokers, to the following effect: "In consideration of plaintiffs paying J. C. Solomon, Ltd., fifty per cent. of any commission received on business introduced by them as agents the defendants should be liable for fifty per cent. of any loss sustained in connection with such business." In respect of a particular transaction so introduced, the plaintiffs sustained a loss but no part of it was paid The plaintiffs having sued to recover the share of the loss,

Held, that the contract was one of indemnity and not in the nature of a *del credere* agency and that the plaintiffs could not recover except on showing actual loss.

JOTTINGS AND CUTTINGS.

A Judge's Bias.—His Honour Judge Higgins, at Brentford County Court, called attention to the curious operation of our law —far more interesting, one thought, than the lengthy observations of McCardie, J., on the right of married women to go away for week-ends. *A,* or *A* and *B,* form a limited liability company and go into liquidation. *A* or *A* and *B* may be men of wealth, but the company is liable only to the extent of its liability as limited by shares, and the creditors may declare in vain that the one man who really is the company ought to pay. Solomon's case decided otherwise. Judge Higgins declared that he was biased against that law.

He declared further that, personally, he was against the person who, having gambled and lost, pleaded the Gaming Act against an honest bookmaker: and most Britons will agree with him, even

those who deplore gambling, and believe, on the whole, in companies whose liability is limited by shares and that the persona of a company is wholly different from that of the one or two persons who have complete "control".—*L.J.*, 1932, p. 240.

Lord Macmillan on Scots Law.—A little book recently published under the title "A Scotsman's Heritage," consisting of a number of papers by different hands on various aspects of Scottish character and Scottish institutions, contains one on Scots law from the competent pen of Lord Macmillan, who knows his subject as few other living writers do. Within the compass of twenty pages he brings out with striking effect the salient features of the law of Scotland, and traces the reasons why it has differed on so many points from the law of England. The two main reasons for the persistent survival of Scots law as a system are, as he points out, deeply rooted, one of them historical, the other temperamental. Historically, a secular hostility existed between England and Scotland during the formative period of the institutions of the two countries. Scotland's sympathies for centuries were with the Continent, rather than with what was known as the "auld enemy" on its southern border. To the Continental universities Scots lawyers went for their training in the civil law, a practice which continued till towards the end of the eighteenth century. Boswell, it may be remembered, went to Utrecht to sit at the feet of one of the great civilians. At that time, too, the Scots reports show, by the frequency of citations from the Continental writers such as Pothier, Voet, Bynkershoek, Puffendorf, and others, how the Scots Bench and Bar turned to the Continent for instruction in legal principles. The temperamental reason for the distinction between the two systems of jurisprudence Lord Macmillan explains by saying that the law of Scotland, to a far greater extent than that of England, is founded on logical deduction from principles, and he quotes from a letter written by Lord Dunedin to *The Times* some years ago, in which he said that the fundamental difference between the common law of England and that of Scotland lay in this, that in England you have to find the remedy in order to discover the right, whereas in Scotland you have to find the right in order to discover the remedy. This view was also that of Maitland, who said that "in order of logic right comes before remedy; there ought to be a remedy for every wrong."

Having touched on these fundamental divergences, Lord Macmillan calls attention to several branches of law in which Scotland still maintains its own distinctive features, particularly the law of the domestic relations and the land laws. As is pointed out, and as, indeed, is generally known, the Scottish law of marriage, "to the benefit of inaccurate southern writers of fiction," continues distinct from that of England, although it is far from being the casual code which it is often represented as being. It rests, as Lord Mac-

millan says, on the simple principle that marriage is a consensual contract, and that persons who have entered into it, like persons who have entered into any other kind of contract, are bound by it; but again, like any other kind of contract, the agreement to enter into it must, if disputed, be duly proved. Again, in the matter of divorce, the spouses in Scotland have always been on an equality, and, further, the wife has rights of succession to a share of the husband's estate which cannot be defeated Turning next to the subject of the land laws, attention is called to the early recognition by Scots lawyers of the advantages of registration. In other matters French influence has been evident, notably in legal nomenclature. Thus the name "advocate" in place of barrister has obtained, and the head of the Bar is the Dean of Faculty, who, like the French *batonnier*, is elected by his brethren, and has as a symbol of office a silver-mounted ebony baton. As to Scottish legal terms, Lord Macmillan admits that "multiplepoinding" and "souming and rouming" have a quaint and fantastic sound, but asks if they are more barbarous than "*cestui que trust* or "*autrefois acquit*". "Assoilzie," as he adds, is good Norman French, and "avizandum" should not seem strange to readers of the English reports where the mysterious abbreviations "*cur. adv. vult*" embody the same verb in the infinitive mood. The whole paper is charmingly writtten, and should not be neglected by anyone who wishes to know something of the law of Scotland.—*L T.*, 1932, p. 245.

Lord Dunedin and R. L. Stevenson.—In view of the important role which Lord Dunedin has played for so many years in the sphere of law we naturally think of him as a great judge and nothing more, great though that role has been It may be interesting then to recall that in his early days he came into personal touch with Robert Louis Stevenson. Both were members of the famous Speculative Society of Edinburgh University, and some years ago Lord Dunedin recalled that he was present at a meeting of the society (of which, by the way, Sir Walter Scott was secretary at an earlier period) when Stevenson made his maiden speech Speaking of the members of the society of that generation the late Lord Guthrie said, as to their probable chances of success in life, that his prophecy would have been the short-sighted one: "Graham Murray (Lord Dunedin) and Louis Stevenson are the cleverest men amongst us; brilliant fellows both of them. But then each is the only child of well-off parents; they are far too well provided for. Besides, neither of them has the iron physique necessary for distinction at the Bar. Anyhow, they are altogether too casual to subject themselves voluntarily to the slavery which eminence demands." Those two, it is added, were the only members who were destined, each in a different sphere, to attain renown. Both were called to the Scots Bar, but ill-health drove Stevenson far

from Scotland; nevertheless, although he and his contemporary, Graham Murray, were separated by the width of oceans, the latter's intimate knowledge of Scots law and procedure were to be placed at the disposal of his friend in his literary work. When Stevenson, with failing health though with unabated courage, was writing the early chapters of what, if finished, would have been his greatest book, "Weir of Hermiston," he was faced with a legal problem in Scots criminal procedure which the limited library equipment of far-off Samoa provided no means of solving by himself. Writing home and stating his difficulty, the matter was placed before his old contemporary of the Speculative and the Parliament House, who by this time was Solicitor-General for Scotland, and he at once gave the requisite information. Stevenson was very grateful and wrote that "Graham Murray's note *re* venue was highly satisfactory, and did me all the good in the world." In this interesting fashion Lord Dunedin's name is linked with the story of "Weir of Hermiston."—*L.T.*, 1932, p. 245.

The New Judge.—The vacancy in the King's Bench Division created by the resignation of Mr. Justice Rowlatt, who retires after twenty years' service on the Bench, with the affectionate good wishes of the whole profession, has been filled by the appointment of Mr. Rayner Goddard, K.C. The announcement of his selection confirmed the general expectation, and will be received with complete approval. Mr. Rayner Goddard, who is fifty-five years of age, was educated at Marlborough and Oxford, and was called to the Bar in 1899. As a junior, he was in great demand, and he has been equally successful as a leader since he took silk in 1923. Heavy and complicated cases were his particular *forte,* and he was a familiar figure in the Commercial Court. Since the death of the late Mr. Alexander Neilson, K.C., he has also frequently appeared on behalf of members of the medical profession in cases which have involved the acquisition—at least temporarily—of an intimate knowledge of medical and surgical details. Mr. Goddard, who was Recorder of Poole from 1917 to 1925, of Bath from 1925 to 1928, and of Plymouth from 1928 until his appointment to the Bench, has also recently acted as Commissioner of Assize. The profession confidently hopes and expects that a distinguished forensic career will be followed by an equally distinguished tenure of the judicial office.—*L.J.*, 1932, p. 247.

Lotteries.—The introduction of the Bill on this subject on the eve of the adjournment for Easter raises one of those questions, of which in these times there are not a few, inviting criticism alike on legal, ethical and religious grounds. The subject opens up possibilities of terminological debate at every point, and not least so as to

the very ambiguous frontier separating a gamble from the ordinary commercial risk. The whole matter has been brought before the public notice of late through the activities of the Irish Sweepstake. It may be a common ground for congratulation on the part alike of those who approve and those who deprecate lotteries that the Bill should give some opportunity for seeing what legislation would involve. Those who deprecate such enterprises may have the additional satisfaction of knowing that there is no likelihood of its being passed during the coming months. The debate has shown some interesting historical facts. Lotteries have in the past repaired havens, started the British Museum, erected the Old Westminster Bridge and so forth. On the other hand an Act of 1541 checking lotteries did so on the ground that the State was endangered by betting; in 1698 another check was imposed, and the Act of 1823 was the result of the report of a committee which declared the lottery to be radically vicious. There was one statement in the speech of Sir W. Davison, who introduced the Bill, which is at the very least a gross exaggeration. He spoke of there being "scarcely a church or chapel bazaar in this country which did not hold its little raffle." There would have been twenty years ago some justification for this sort of allegation, but in gatherings of clergy and laity very strong views as to them have more recently been expressed, and they are to-day rare and deprecated. There is much force in the argument that the present state of the law, which frowns on the lottery and smiles at the totalisator, which welcomes the post office receipts arising out of betting transactions while it searches the letters of private individuals (including those of solicitors to their clients) lest they should be too deeply concerned in the Irish Sweepstake, is at least contradictory, and that an inquiry into the whole subject-matter might be useful as establishing some sort of intelligible and workable principle. The speech of Mr. R. H. Morris for the rejection of the Bill brought out at any rate one very practical consideration, assuming that his figures were accurate. If so, they suggest that the benefits alleged to enure to hospitals from sweepstakes are less than have been supposed. Some thirteen millions pounds were raised last year, by bequests, subscriptions and patients' gifts. The figures of the Irish sweepstakes indicate that no such sum could be raised in a year, and furthermore, it is alleged that annual subscribers are already withdrawing their aid from the Irish hospitals.—*L T*, 1932, p. 265.

The Bill.—Taking all these arguments, pro and con, into consideration, legislation on the lines suggested by Sir W. Davison requires much more information before it can safely be passed into law, and probably should be sponsored by the Government if its principles are affirmed. The present Bill is wider in its terms than

that introduced by him last year, for it would authorise money being raised for charitable, scientific and artistic purposes or any public improvement or other public object. It empowers trustees of these bodies to hold lotteries subject to the approval of the Secretary of State and in pursuance of a scheme so approved. As already indicated, there is little likelihood of the Bill making much progress in the immediate future. It has, however, now on two occasions been presented to Parliament, and it would be well if its implications and probable effects were weighed carefully and not least so by those who, being engaged in social work, know best how these things would affect the home lives of the people —*L.T.*, 1932, p. 265.

Mr. Justice Wightman.—In one of Mr. Augustine Birrell's essays there is a pleasant story of Mr. Justice Wightman being discovered out of term one very cold day gloating over a large fire and the "Life and Letters of Mrs. Hannah More." Being old-fashioned perhaps accounts for the particular literary work on which he was then engaged, but the story recalls to us that Wightman was one of the members of the judiciary with interests outside the confines of the law. Of this we are also reminded by the fact that he astonished Lord Campbell, when they were journeying the Northern Circuit together, by displaying stores of literature "for which," said Campbell, "I had never given him credit." Curiously enough, during the past week, the present writer, who remembered little of the distinguished judge save that he was the father-in-law of Matthew Arnold and that the latter frequently acted as Marshal to the judge, met in the course of his miscellaneous reading several pleasant anecdotes about him which, if they showed that, like other people, he had his little oddities, tended to virtue's side. Not unnaturally, he was very proud of the literary fame of his son-in-law, whom he was in the habit of introducing as "My son-in-law, Matt Arnold, Professor of Po-e-try at Oxford": Arnold reciprocated the esteem, and in one of his letters mentions that he liked to watch the judge trying cases, "he does it so admirably." It seems that one of the judge's peculiarities was to get hold of the menus of banquets and to go through each item of a Barmecide feast. "I should have twice of fish; I would take the entree but not the joint; I should have a large helping of duck, and two helpings of ice pudding"—quite a harmless and not altogether unpleasant form of literature; but in the sphere of gastronomy he did not content himself with conning the menus of bygone dinners, he kept an eye at times on that for his own delectation on circuit. We are told that once he took the precaution to visit the larder and inspect the fare provided for the judges and their clerks. A fine salmon reposed in one dish and some whiting in another. "Who are these for?" asked the judge. The attendant replied that the latter were intended

for their Lordships, and the former for their Lordships' clerks. "Oh, indeed," said the judge "well then, you'll be good enough to send that to their Lordships and those to their Lordships' clerks " As a judge he probably shared the view expressed by Lord Ellenborough that the court sat not to court argument but to endure it; but while that might be so, Mr. Justice Wightman invariably expressed himself without that irritability of tone so characteristic of Ellenborough. On one occasion we are told that Mr. Ribton, a noted advocate of a past day, was indulging in repetition even unto the third or fourth iteration. The judge mildly said, "Really, Mr. Ribton, you know, you've said that before." "Have I, my Lord? I am very sorry. I quite forgot it." "Don't apologise," said Mr. Justice Wightman, patiently stifling a sigh. "I forgive you, for it was a very long time ago." Could anything have been neater?—*L.T.*, 1932, p. 267.

A Patient's Refusal to an Operation.—At an inquest on a postman in Paddington recently, it appeared that the man had been thrice gassed in the War, with the consequence that, from time to time, he had to have hypodermic injections in the chest. On the latest occasion the needle broke, and the doctor, knowing of the danger, desired to remove it at once, but the patient objected. The next morning he again refused to allow of the operation, although the doctor pressed him to give his consent, and he died soon afterwards. At a post-mortem, the needle was found to have moved, and had slightly penetrated the lung. The man was in a bad state, and could not have lived long; but the coroner recorded his verdict that death was accelerated by the puncture of the lung, and added a rider that it should have been removed by the doctor. He observed: "I cannot help thinking that the doctor had listened too much to the patient and not to his own sense of duty. There are times when the patient's feelings shoud not dominate, and when it is the doctor's duty to insist." This reasoning may perhaps be sound, but the very difficult position of a doctor who does insist on operating in the face of the patient's positive veto is worth consideration. We discussed the matter generally in a note five years ago, 71 Sol. J. 110, quoting various cases, amongst others one before Lord Brampton as Hawkins, J. In that case the doctor was held justified in removing both ovaries when the patient had only given her consent to the removal of one, but on incision he found each so diseased that he deemed it necessary to remove both to save her life. When he made his decision, therefore, the patient was unconscious, and incapable of consenting, which was not the case here, for the consent was requested and refused. The legal dangers even of examining the body of a patient against his or her will are set forth at considerable length in Taylor's "Medical Jurisprudence," 8th ed., pp 59-69, and an operation is, of course,

more serious than a mere inspection. An operation performed in the face of the express veto of the patient, which was unsuccessful in its immediate object, but which the patient survived, would, it may be surmised, render the doctor who performed it liable to heavy damages in an action for trespass to the person. If a patient *sui juris* refuses to submit voluntarily to an operation, there is no legal authority to override him, nor is anyone liable if he dies as the result of such refusal. In the case of children, on the other hand, a parent may commit an offence by refusing to consent to a neces sary operation on a child, see *Oakey* v. *Jackson*, (1914) 1 K.B. 216, quoted in our previous note.—*S.J.*, 1932, p. 237.

The New Judge.—The translation—if we may borrow a word with an ecclesiastical flavour—of Mr. Jnstice Wright to the House of Lords, has been followed by the appointment of Mr. Geoffrey Lawrence, K.C., to be a Judge of the King's Bench Division. The appointment was fully expected—indeed Mr. Lawrence had been freely "tipped" for each of the last three vacancies—and it will be very popular. The new Judge joins the select and increasing band of sons who have followed their fathers from the Bar to the seat of judgment; at the present moment it includes Lord Russell of Killowen, Lord Justice Romer, Mr. Justice Finlay, Mr. Justice Charles, Mr. Justice Macnaghten, and Mr. Justice Farwell. The Hon. Geoffrey Lawrence is of course a son of Lord Trevethin, who was from 1904 to 1921, Mr. Justice A. T. Lawrence. and who for a short period was Lord Chief Justice, in succession to Lord Reading. Mr. Geoffrey Lawrence, who was called in 1906 and took silk in 1925, has been Recorder of Oxford since 1924 and has had a considerable practice on the Common Law side. He had a distinguished career in the Army during the War and was accorded the D. S. O. He goes to the Bench with the cordial good wishes of the profession.—*L.J.*, 1932, p. 265.

A Heinous Crime.—A correspondent writes: The popular press is always worth following—especially the evening press—not for its big stories, which are usually rather less than worthless, but for the little items that help the harassed "maker-up" to fill out a column. These unconsidered trifles throw all sorts of queer side-lights on the life we live to-day. We are indebted to the *Star* of April 6 for one that is peculiarly illuminating. A Hornsey shop-keeper was haled before the local bench. His crime hardly bears mentioning—*non nominandum inter Christianos*—but in a legal journal one need not mince words. At the risk of shocking our readers we will be quite frank. The fellow was charged with an offence that every high-minded bureaucrat must regard with loathing. *He had sold a tin of enamel on the afternoon of Early Closing Day!* But such is the depravity of the times that he actually had the impu-

dence to plead (what in fact was true) that the commission of the offence had been deliberately procured by the prosecution by means of certain subtle crafts and devices, to wit, by inducing an obliging youth to knock at the defendant's back door and tell an ingenious fiction about the desperateness of his need for a tin of enamel. The tin of enamel was supplied. The needful evidence was obtained. The summons duly followed. The borough council inspector swore to the abomination. It will hardly be credited, but it is none the less true that this upright official, who was only doing his duty, *was actually cross-examined* by the defendant's solicitor, who had the effrontery to ask if the witness thought it part of the said duty "to procure and connive at a breach of the law." The witness's reply was admirable in its combination of dignity with humour. *"It is my duty,"* he said, *"to see that the Shop Hours Act is carried out."* We regret to have to add that the Bench showed a deplorable lack of appreciation of the inspector's zeal. In announcing that the summons was dismissed, the Chairman was almost rude.—*L.J.*, 1932, p. 267.

A Headmaster's Liability.—The Court of Appeal last week, in *Langham* v. *Governors of Wellingborough School and Fryer,* allowed the appeal of Mr. P. A. Fryer, the headmaster of the school, from the verdict and judgment in an action tried at Northampton Assizes, in which the plaintiff, a pupil at the school, claimed damages for injuries received from a golf ball hit by another boy. The plaintiff was passing an open door, carrying some books, when the ball came in from the playground and struck his right eye, the use of which he lost as a consequence. Playing with golf balls and other hard balls in the school precincts had been forbidden It seems that the ball was hit with an ordinary walking-stick, and evidence was given to prove that a golf ball had never been hit in the playground before. Counsel for the respondents urged that a golf ball plus a stick in the hands of a boy on a playground with an asphalt surface constituted a very dangerous combination. Lord Justice Scrutton, in giving judgment, said that for the plaintiff to succeed in such a case there must be evidence of some lack of supervision, and that the accident was caused thereby. In his opinion there was no evidence in the present case which could justify the finding that the headmaster had been negligent, and the case ought not to have been left to the jury.—*L.T.*, 1932, p 276.

Judges and the Privy Council.—While each Lord Justice on his appointment to the Court of Appeal is almost immediately sworn of the Privy Council, the like honour in the case of puisne judges is usually deferred till their resignation from the bench of the High Court. There have, it is true, been exceptions to this rule

in that one or two puisnes, during their tenure of office, have been created members of the Privy Council; this happened, for example, in the case of the late Mr. Justice Kekewich, as also in that of Mr. Justice (now Lord) Darling. Nowadays, the inclusion of retired judges in the Privy Council is little more than a graceful and well-deserved recognition of the services they have rendered to the country, although in some instances their further services have been requisitioned for the Judicial Committee. The late Sir Arthur Channell, for example, seemed never to tire of work, and so time and again, after he had resigned from the High Court bench, he was found giving assistance in the Judicial Committee of the Privy Council, his connection with which is memorable not only by the judgments, although technically that is not the correct expression, he delivered, but also pictorially by one of the illustrations in Sir Almeric Fitzroy's "History of the Privy Council," where he is seen sitting with Viscount Sumner, Lord Parmoor and Lord Wrenbury. In earlier days, however, before the judicial strength of the House of Lords was increased by the appointment of a larger number of Lords of Appeal in Ordinary, who thus became available likewise for the work of the Judicial Committee, ex-judges were frequently requisitioned to constitute a quorum of that tribunal. Apparently it was not always an easy matter to secure the requisite number of trained judges for the hearing of Indian and Colonial appeals, and more than once the Duke of Buccleuch, during his tenure of the office of Lord President of the Council, was commandeered to make a quorum. The Duke had to take part, a silent one it is true, in the hearing of an appeal relating to the will of a Hindu, which lasted four days, and he confessed that he did *not* relish the experience, although one of his judicial colleagues assured him that the Indian appellants would much rather have their cases decided by a great Scottish duke than by mere lawyers. Whether this little piece of flattery compensated him for his four days' boredom is not recorded.—*L.T.*, 1932, p. 285.

Political and Legal Pensions.—The proposal of the French Chamber of Deputies that ex-Presidents of the Republic should receive a pension is interesting as reflecting the feeling that those who have served the Presidential term should receive some recognition from their country for the services they have rendered. At one time in our own country the bestowal of pensions for political services (which usually consisted merely in voting steadily with the Ministry in office) was on a lavish scale. Burke inveighed against the system as it was in operation, and although his precise proposals for economy did not secure acceptance, they influenced shortly afterwards the curtailment of expenditure very considerably. At the present time a limited number of pensions for political services may lawfully be granted under the provisions of the

Political Offices Pension Act, 1869, the pension varying in amount according to the salary attached to the office in which the grantee had served. The applicant for such a pension is required, by virtue of sect. 6 of 4 & 5 William 4, c. 24, to state in writing the services in respect of which he makes the claim, and also to make "a specific declaration that the amount of his income from other sources is so limited as to bring him within the intent and meaning of this Act," that is, he must show the inadequacy of his private fortune to maintain his station in life. Apparently the *bona fides* of the statement as to the applicant's need of a pension has sometimes been investigated, for we are told that Mr. Gladstone had an unpleasant experience of the relations brought about by the refusal of a pension on the ground that the applicant's statement of his income was inaccurate: see Morley's "Life of Gladstone," Vol. III, p. 108. No pensions of this class are paid at the present time, the last holders having patriotically resigned them.

Legal pensions stand on a very different footing, for, while political pensions of the kind just referred to may be granted after only a few years' service in the particular offices, judges are required to perform their work (apart from earlier incapacity through ill-health) for fifteen years. In their case, too, acceptance of office usually means a marked diminution of income for which even the prospect of a pension at the end of fifteen years scarcely compensates. Moreover, ex-judges are frequently called upon to undertake public work gratuitously, and to their honour be it said, they ungrudgingly shoulder these extra tasks, and thus may be said to be earning their pensions concurrently with receiving them.—*L.T.*, 1932, p. 285.

Lord Buckmaster's Road Traffic Bill.—Lord Buckmaster's Road Traffic Bill was read a second time in the House of Lords on Tuesday without a division. Clause 1 proposes to abolish the distinction between criminal and civil negligence where a person is killed by the driver of a motor vehicle. The driver, if his negligence has caused the death, will be guilty of manslaughter. Under cl. 2, where the negligence causes only bodily injury, the driver will be guilty of unlawful wounding. Clause 3 imposes a five miles per hour speed limit on goods vehicles over five tons weight. The argument for the Bill was based on the appalling sacrifice of life and infliction of personal injury which motor traffic causes; during the last three years over 20,000 killed, and more than half a million injured. The House naturally agreed that this state of things cannot be allowed to continue, but the official view, as expressed by the Lord Chancellor—though we doubt whether it is his personal view—is that the present law is sufficient if it is enforced.—*L.J.*, 1932, p. 302.

Civil and Criminal Negligence.—The answer is that it is not enforced, largely because magistrates and juries take too liberal a view of civil negligence. Motorists who have killed by obviously culpable negligence. continually escape a verdict of manslaughter because the negligence is described as only civil. Objection also was taken to placing motorists under a special law of manslaughter. But, as Lord Buckmaster said in his reply, this distinction only recognises the special danger which motor traffic as now carried on causes. It may be that the Bill will not pass in its present form, but its favourable reception by the House makes it probable that the Government will be forced at length to recognise that their primary duty is the protection of life. That obvious truth has been forgotten in dealing with the development of motor traffic. Where death or serious injury is caused, there should no longer be the possibility of setting up the indefinite distinction between civil and criminal negligence. Lord Buckmaster's statement of the case, forcible without exaggeration—unhappily the facts speak for themselves—made it impossible for the House to condone the official failure to act, and secured the Second Reading.—*L J.*, 1932, p. 302.

Not Wholly Ineffective.—Du Parcq, J., ought not to worry overmuch at the failure of litigants to come up to the scratch on the testing day of trial. He observed recently that three common jury cases were on his list for trial. One or other of the parties failed to appear in each case. Two were disposed of and one adjourned. The Judge thought it was "lamentable, with hundreds of actions waiting to be tried, which had necessitated the appointment of an additional Judge, that the daily Cause List should contain so many ineffective cases. Solicitors, being officers of the Court, should take the trouble to inform the Associates if there were any doubt about their cases being effective, so that others might be added "

This is sound sense; but who can say if the solicitors are to blame? An "ineffective" case may have become so because the lay client at the last moment lost his nerve for fighting. And many a litigant who would be willing enough to take his chance with an uncertain case before one Judge might not so readily appear before another. And if it be true that Du Parcq, J., has already acquired such a reputation for discernment as to send the man with the weak case to cover, he has done well, and satisfactorily disposed of his daily portion. He is entitled, in my submission, to rise early and depart as many another good Judge has done before him. Every day will not be like that.—*L.J.*, 1932, p. 312.

The New Procedure Rules.—The Rule Committee have now, after due deliberation, but without anything like undue delay, formulated rules, "framed on the analogy of the Commercial Court,"

which are to apply to such King's Bench actions as are suitable for the abridged procedure thereby constituted. They are to come into operation on the 24th inst. A helpful and readable memorandum accompanies these "New Procedure Rules," and this, together with the rules themselves, will be found in another part of this issue (*post*, p. 354). Henceforward actions pending in the King's Bench Division will appear in either the "new procedure list" or the "ordinary list," but actions in which fraud is alleged by the plaintiff, and those for libel, slander, malicious prosecution and so on, in which the parties are entitled to a jury as of right, can never find a place among the new procedure actions. If satisfied that an action is one to which the order can apply and that it is not by reason of its complexity or otherwise unsuitable, the plaintiff's solicitor may claim at the outset that his client's action is "fit for the new procedure," while a rule to be inserted in Order XII dealing with appearance, empowers the defendant's solicitor at a later stage to insert in his memorandum and notice of appearance a certificate that the action is so fit and thus secure its transfer. There seems to be no provision to secure inclusion in the new list at any other stage, whether by consent or otherwise. Solicitors will thus have to shoulder a considerable burden of responsibility, both to their clients when advising, and to the court when certifying, but as the memorandum says, they are officers upon whom the court relies, and their assistance in the initial stage of litigation will be welcomed to ensure that the new list is not burdened with unwieldy cases. A mistaken inclusion in the new procedure list can, if it comes to light, be rectified by the judge on the hearing of the summons for directions.—*L.T.*, 1932, p. 335.

BOOK REVIEWS.

SARKAR ON EVIDENCE, Fifth Edition, by S. C Sarkar. Price Rs. 16

We have great pleasure in acknowledging the receipt of the fifth edition of this work. For some years, this book has been looked upon as the leading commentary on the Indian Evidence Act, being the most exhaustive treatise on the subject. It is therefore necessary only to notice the additional features of the present edition. The text has been in many places re-written with reference to latest decisions and a large number of new cases have been added with the result that the volume has grown by the addition of nearly 200 pages over the last edition. This will certainly add to the usefulness of the book as a book of reference. It is only fair to add that it has become almost a necessary book of reference to every lawyer and judge.

LECTURES ON CONTRACTS, by Mr. T. S. Venkatesa Aiyar, M.A., M.L., Advocate, Madras. Printed at the Royal Printing Works, Mount Road, Madras.

This is a unique work of its kind on the Law of Contracts. There are excellent treatises treating of the English Law of Contracts and there are valuable commentaries on the Indian Contract Act. The work under review combines the advantages of both and has the additional merit of being useful to the students of law, as well. The learned author has, in his long course of experience as professor of Law, come into contact with students and their difficulties in understanding the subject. He has also from his practice at the bar realised the needs of the profession. In his lectures, which form the bulk of this part, he has dealt the subject in its natural order of treatment giving a comparative study of the English and Indian Law. The principles underlying the various topics have been clearly set out with reference primarily to the English Law and the differences in Indian Law are referred to in their appropriate places. The leading English decisions up to date are referred to and the principles are stated almost with the language of the eminent Judges in England. In elucidating the principles, the learned author has given his suggestions and offered criticism on the various topics wherever needed. The second portion of this volume is devoted to giving a commentary of the first seventy-five sections of the Indian Contract Act with the English and Indian decisions. The Indian case-law on the subject is given under the several sections and references are given for a discussion of the principles to the lectures portion of the book. With a view to illustrate our observation that the principles and history of the law have been stated with clearness and thoroughness, we would only draw attention to the treatment of consideration in the lectures portion where the author has put together valuable information gathered from various sources and not found in any one single work. We have no doubt that with the appearance of the second part dealing with the special branches of the Law of Contracts, such as the Sale of Goods, Indemnity and Guarantee, Bailments, Agency and Partnership, we shall have a self-contained work on the Indian Law of Contracts.

THE INDIAN REGISTRATION ACT, by K. K. Vaidya, M.A., LL.B., Solicitor, High Court, Bombay. Second Edition, 1932. Price Rs. 3-8-0.

The numerous recent amendments to the Indian Registration Act by the Transfer of Property Act and other enactments have called for the second edition of this book. The effect of the amendments has been noted in their proper places and the case-law has been brought up to date. We have no doubt that with

the useful appendices giving the provisions of analogous enactments and the fees rules of the various provinces, the book will be found a handy and reliable guide to the members of the legal profession as well as to Registration officers.

THE INDIAN PARTNERSHIP ACT, 1932, by R. Narasimhachariar, B.A., B.L., Advocate, Madras. Published by the Law Publishing Company, Mylapore, Madras. Price Rs. 2-8-0.

This edition of the Partnership Act which comes into force on 1st October, 1932, will be welcome to legal practitioners and businessmen who desire to make themselves acquainted with its provisions. The enactment is a short one and the book is naturally small. We find collected under each section the leading English and Indian cases on the subject. The remarks of the Special Committee which was composed of eminent lawyers are also reproduced in their suitable places. There is a comparative table at the beginning of the book giving reference to the corresponding provisions of the English Partnership Act and the Indian Contract Act and the appendices give the sections of these Acts *in extenso*.

PRINCIPLES AND PRACTICE OF COMPANY LAW, by S. M. Sen, M.A., B.L., and A. K. Banerjee, M.A., B.L., Advocates, High Court, Calcutta. Price Rs. 6.

The subject of Company Law is one of practical interest to businessmen and a knowledge of it is therefore essential to them; but a study of the Act itself is not likely to be of much profit to them by reason of their unfamiliarity with the modes of legal expression. The present book which treats of the subject in the form of chapters dealing with each topic in its logical order will be found more easily intelligible to them. The leading cases are, however, referred to and the Act itself is given after the exposition of the subject in the shape of chapters. The appendices give useful information on allied topics. We believe the book will be found of assistance particularly to students of law and businessmen.